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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. PAUL POINTER, Defendant and Appellant.	2d Crim. No. B212717 (Super. Ct. No. TA094455) (Los Angeles County)

Paul Pointer appeals from judgment after conviction by jury for murder in the first degree. (Pen. Code, § 187, subdivision (a); 189.)[1] The jury found true allegations that appellant personally used a firearm and that he personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (b) and (c). The trial court sentenced appellant to an aggregate term of 50 years to life in prison.

Appellant contends that the court (1) should have instructed the jury on the law of accomplice testimony and (2) should have excluded evidence that another witness was threatened by an unidentified person. We affirm.

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[1] All statutory references are to the Penal Code unless otherwise stated.

FACTS

Amber Sanders was shot to death on Greenleaf Street on August 18, 2001. She was 15 years old. She was shot twice in the back and the bullets passed through bone. No bullets or casings were found. The initial investigation led nowhere.

Six years later, Carlee Jackson came forward as an eyewitness. He was a friend of appellant's and a convicted felon. During the investigation of another crime, Jackson told a detective that he saw appellant kill Amber. Jackson was released by Arizona authorities from jail six days early so that he could testify at appellant's preliminary hearing. Also, in a case in which Jackson had been convicted, a court reduced Jackson's sentence by striking a prior conviction based in part upon Jackson's cooperation in an unspecified significant case. Evidence of these facts was received at trial.

Jackson was the only eyewitness to the killing. He testified that before Amber was killed, he was driving around with appellant and Amber in appellant's cream colored Jeep Cherokee. Appellant had introduced Amber as his "little 'ho." The three had been together at a hotel the night before. Appellant was very angry with Amber. Jackson heard appellant say to Amber, "You need to get your ass out there on a 'ho-stroll [prostituting] and make some money." Amber said, "Hell no, Paul, I'm not doing that shit." As they drove down Greenleaf Street, arguing, the Jeep's engine "coughed out." It would not restart. Jackson and appellant pushed it to the curb. Jackson realized he was wearing a red shirt in a neighborhood where there "are some enemies."[2]

Jackson walked away. Amber was behind him wearing a Walkman stereo. Jackson heard three gunshots. He turned and saw Amber collapsing forward. She had been shot in the back. Appellant had a .357 revolver in his hand. Jackson left. He later asked appellant, "Why did she get laid down?" Appellant said, "Fuck that bitch." In his initial interview, Jackson said the girl's name was either Amber or April and he denied being at the hotel the night before the killing.

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[2] The court did not allow reference to the gang membership of Jackson or appellant at trial.

Some physical evidence corroborated Jackson's story. Amber's body was found on Greenleaf Street, face down, with a Walkman, and she was shot in the back. Detective Harris, the investigating officer, testified that the absence of casings at the scene was consistent with use of a revolver and that a .357 would have had sufficient velocity to cause the bullets to pass through her bones as they did. Appellant's car was having engine trouble around the time of the crime. Detective Harris did not give any details of the case to Jackson before interviewing him.

Three witnesses testified to events before and after the shooting. They were a security guard, an auto mechanic and an area resident.

The security guard, David Tran, worked at a nearby cemetery. Before noon on August 18, Tran heard five gunshots and went out to the street where he saw a cream colored Jeep Cherokee driving very slowly. He did not see the occupants. When he came onto Greenleaf, the car sped up and quickly drove away. Tran saw a girl lying on the road. At the preliminary hearing, Tran positively identified appellant's cream Jeep Cherokee from a photograph. But at trial, when he was shown the same photograph, he said, "I didn't pay attention," and "I cannot recall right now." The prosecutor confronted him with his preliminary hearing testimony, after which Tran agreed that the Jeep in the photograph was the same Jeep that he saw.

Later, Tran told an investigator that he had lied on the stand because he was afraid. Over defense objection, the trial court allowed the prosecution to recall Tran. Tran then explained to the jury that he was scared to identify appellant's car in the photograph because right after he did so at the preliminary hearing his own car was stolen and burned.[3] Tran said that in fact he was sure that it was the same car, and he was lying earlier when he hesitated to identify it.

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[3] The court did not allow a photograph of Tran's burned car to be shown to the jury. In a section 402 hearing, Tran said that he was afraid because appellant had been glowering at him and because his co-workers had advised him not to testify. Neither fact was elicited in his testimony before the jury.

An auto mechanic testified that five days after Amber was killed, appellant brought his cream colored 1993 Jeep Cherokee into his shop for repair. The engine would not start and needed to be rebuilt.

The defense called an area resident who testified that on a Saturday morning he saw an SUV stopped on Greenleaf Street with four people around it. He saw two black men arguing in front of it and he saw another man and a lady with loose blond hair. He could not remember their faces. The SUV was "new" and big, "like a, you know, Ford Explorer or like a Tahoe, something like that. It was a big one." He said the color was "roughly kind of gray. But it's kind of tough to say if it was gray or a different color." He drove by again about 30 or 40 minutes later, and the situation was the same. When he got home, a mile away, his brother heard gunshots. They looked out the gate but could only see police. He did not see a body. Later, when he saw news about the killing on television, he thought he might have been the last person to see what happened.

Defense counsel did not request an accomplice instruction and he did not request a limiting instruction concerning Tran's testimony. Neither was given.

DISCUSSION

Accomplice Instruction

A defendant may not be convicted on the testimony of an accomplice unless it is corroborated by other evidence connecting the defendant with the crime. (§ 1111.) The trial court has a sua sponte duty to instruct the jury on the law of accomplice testimony if there is evidence from which the jury could find that a witness implicating the defendant was an accomplice. (*People v. Lewis* (2001) 26 Cal.4th 334, 369.) If, on the other hand, there is no evidence sufficient to support a finding that the witness was an accomplice, the court need not instruct on accomplice testimony. (*Ibid.*; *People v. Hoover* (1974) 12 Cal.3d 875, 882.)

On review of a claimed failure to give an accomplice instruction, we look for evidence in the record sufficient to support a conclusion by the jury that the witness was an accomplice. (*People v. Gordon* (1973) 10 Cal.3d 460, 468, disapproved on other

grounds in *People v. Ward* (2005) 36 Cal.4th 186, 212.) The evidence must be substantial, not speculative. (*People v. Lewis, supra,* 26 Cal.4th at p. 369.)

An accomplice is "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111.) Accessories are not accomplices. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103.) Only a principal is an accomplice. (*People v. Richardson* (2008) 43 Cal.4th 959, 1023.) To be a principal, the witness must have either personally committed the crime or aided and abetted in its commission. (§ 31.) "'An aider and abettor is one who acts with both knowledge of the perpetrator's criminal purpose and the intent of encouraging or facilitating commission of the offense.'" (*Richardson,* at p. 1023.) "It is not sufficient that he merely gives assistance with knowledge of the perpetrator's criminal purpose." (*People v. Sully* (1991) 53 Cal.3d 1195, 1227.) He must "*share*[] the perpetrator's criminal purpose." (*Ibid*.)

Appellant argues that the following evidence supports an inference that Jackson was an accomplice: Jackson was present when Amber was shot and did not intervene to protect her, he was closely associated with appellant, he knew details about the crime, he lied about being at the hotel the night before the killing, he left the scene and he did not report the crime for six years. These facts are not sufficient to warrant a conclusion that Jackson was an accomplice.

Presence at the scene of a crime and failure to prevent its commission are not sufficient to establish liability as an aider and abettor. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90.) Speculation that a witness could have foreseen a murder is not sufficient to require an accomplice instruction. (*People v. Sully, supra,* 53 Cal.3d at p. 1228.) Evidence of flight is a fact that may be considered in deciding a defendant's guilt or innocence, but flight "is not sufficient in itself to establish [a party's] guilt." (§ 1127c.) Intimate knowledge of the crime is not substantial evidence that a witness is an accomplice. (*People v. Lewis, supra,* 26 Cal.4th at p. 369 [in which evidence that a witness was at the crime scene and had intimate knowledge of the crimes and a history of

dishonesty, among other things, was insufficient to require the trial court to instruct on accomplice testimony].)

Moreover, there is no evidence in the record to support an inference that Jackson knew of appellant's wrongful purpose and intended to encourage or facilitate the crime. (*People v. Hoover, supra,* 12 Cal.3d at p. 879, [in which evidence that the witness owned the car and gun that were used in a shooting and that he was driving the car and slowed down while the defendant fired the shots was insufficient to require an instruction on accomplice testimony in view of the witness' status as an undercover FBI agent].) The evidence concerning Jackson's state of mind supported only an inference that he was surprised by the killing. Nothing contradicted his testimony that he was already leaving the scene when he heard shots and turned around and saw Amber fall or that he later asked appellant why Amber got "laid down." There was no evidence from which the jury could have concluded that Jackson shared appellant's criminal intent.

In each of the cases relied on by appellant, there was evidence that the witness knew of the perpetrators' wrongful intent and encouraged or facilitated the crimes. In *People v. Villa* (1957) 156 Cal.App.2d 128, there was evidence that the witness forced the victim into his car, beat her into submission, and then let the perpetrators into the back seat where they sexually assaulted and beat her while the witness drove. (*Id.* at 136.) In *People v. Fauber* (1002) 2 Cal.4th 792, 833, there was evidence that the witness pointed out the location of the planned robbery to the perpetrators, saying they should "rip off" the victim "now," and that the witness twice returned before the crime to "scope out" the house. (*Id.* at p. 812.) In *People v. Tewksbury* (1976) 15 Cal.3d 953, there was evidence that the perpetrators planned the robbery of a restaurant in the witness' home while she was present, that she called the restaurant to find out for them what time it would be closed, that she provided them with paper and pen to make a diagram of the restaurant, which she looked at, and that she drove the perpetrators to a place close to the crime scene. (*Id.* at pp.957, 960-961.)

Even if the court had erred in omitting accomplice instructions, the error would have been harmless. A trial court's failure to instruct on accomplice liability is

harmless if there is sufficient corroborating evidence in the record to connect the defendant with the commission of the crime. (*People v. Lewis, supra,* 26 Cal. 4th at p. 370.) Corroborating evidence is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the witness is telling the truth. (*Ibid.*) It may be slight, it may be entirely circumstantial, and it need not be sufficient to establish every element of the crime. (*Ibid.*) Here, appellant's malfunctioning cream colored Jeep Cherokee, seen by Trans at the crime scene, linked appellant to the crime. Physical evidence tended to corroborate Jackson's testimony that appellant used a .357 revolver and that Amber was shot from behind. Jackson's testimony was also corroborated by the location of Amber's body and the Walkman stereo that was found with it.

Tran's Testimony That His Car Was Stolen and Burned

Appellant contends that Tran should not have been permitted to explain the basis for his fear of testifying because the testimony was irrelevant and was likely to cause jurors to speculate that appellant was a dangerous person who was involved in the theft and burning of Tran's car. We conclude that the evidence was relevant to Tran's credibility and that the trial court acted within its discretion when it admitted it.

No evidence linked appellant to the theft and burning of Tran's car. This fact does not render the event irrelevant. Evidence that a witness is afraid to testify is relevant to his or her credibility. (Evid. Code, § 780; *People v. Valencia* (2008) 43 Cal.4th 268, 302.) A threat, even by a third party, is relevant to explain the basis for the witness' fear so that the jury may assess it. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1141-1142.) "[T]here is no requirement to show threats against the witness were made by the defendant personally or the witness's fear of retaliation is 'directly linked' to the defendant." (*Id.* at p. 1142; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368-1369.) The case relied on by appellant, *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, is inapposite because it did not involve a fearful witness.

A trial court has discretion to allow a witness to explain the basis of his fear. (*People v. Burgener* (2003) 29 Cal.4th 833, 869; Evid. Code § 352.) Here, the trial court carefully considered admission of the evidence after hearing Tran's proffered

testimony and counsel's argument outside the presence of the jury. The court's conclusion that the probative value of the evidence outweighed any risk of undue prejudice was not an abuse of discretion. The court gave the standard instructions cautioning jurors not to speculate and appellant's counsel did not request a limiting instruction. The court had no sua sponte duty to give one in the circumstances. (*People v. Stewart* (2004) 33 Cal.4th 425, 493-494.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

YEGAN, Acting P.J.

PERREN, J.

Jerry E. Johnson, Judge

Superior Court County of Los Angeles

Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Shawn McGahey Webb, Deputy Attorney General, for Plaintiff and Respondent.